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No. 83-989

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM N. JAMES, ET AL., PETITIONERS
v.
TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, having quoted certain law review articles and texts in its opinion, the court of appeals erred in refusing to accept, as a basis for rehearing, affidavits from their authors and other experts applying the principles discussed in those materials to the facts of this case.

2. Whether the courts below correctly found that petitioners' statistical analyses improperly modeled jobs at a scientific research facility, and treated as comparable jobs that require very different qualifications and have very different responsibilities.

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OPINIONS AND ORDERS BELOW

The opinion of the district court (Pet. App. E1-E33) is reported at 528 F. Supp. 862. The May 2, 1983, opinion of the court of appeals (Pet. App. D1-D25) is reported at 704 F.2d 613. That court's orders of June 27 and July 18, 1983 (Pet. App. C1 and B1)[1] are unreported, and its September 12, 1983, opinion on rehearing (Pet. App. A1-A3) is reported at 714 F.2d 1066.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1983, and a petition for rehearing was granted in part and denied in part on September 12, 1983. The petition for a writ of certiorari was filed on Monday, December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]The June 27 order is incorrectly dated July 27 (Pet. App. C1; compare Pet. 2).

STATEMENT

This case, initiated in 1973, is a class action alleging discrimination against blacks employed by the Office of Agricultural and Chemical Development (OACD) of the Tennessee Valley Authority (TVA) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*

1. The TVA is a wholly owned government corporation (16 U.S.C. 831-831dd), charged with, inter alia, "improv-[ing], increas[ing] and cheapen[ing] the production of fertilizer and fertilizer ingredients" (16 U.S.C. 831j), through laboratory and experimental work (16 U.S.C. 831d(h)). These responsibilities are carried out by OACD at TVA's National Fertilizer Development Center at Muscle Shoals, Alabama.

OACD conducts fundamental and applied research in fertilizer chemistry, develops the technology for producing new fertilizer materials, designs and operates pilot and full-scale manufacturing plants to show the commercial feasibility and utility of the new products and processes, and works with the fertilizer industry and agricultural enterprises on the proper production and use of fertilizer technology.

Work functions in OACD are grouped by pay schedule: SA (administrative), SB (clerical), SD (scientific), SE (technical), and SF (custodial) Pet. App. E4-E5;Tr. 2311-2316; 4650-4651; DX 33 paras. 12, 73-87, 89, 153.[2] Each schedule is divided into various grade levels and steps within grade levels; individuals move from lower to higher grade levels within schedules either by promotion to vacant positions or, more frequently, by reclassification of the positions held to reflect changes in responsibilities (Pet.

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[2]After trial, the district court decertified the class action as to the SA schedule (Pet. App. E6). Petitioners do not contest this ruling here.

App. E5). Employees tend to be promoted or reclassified within schedules; they do not normally move between schedules. Tr. 2441-2442; 2968-2975; PX 524, 545, DX 80-81, 87, 133.

Employees on the SE schedule provide technical support to scientists and engineers who conduct the research. Many positions in the upper levels of the SE schedule require extensive training and experience in such technical skills as engineering drafting and chemical laboratory analysis. OACD does not normally provide this training, which is usually obtained by prior technical school or college program training. In addition, several employees at upper levels of the SE schedule were not college graduates but had extensive experience (5-16 years) outside OACD in such fields as engineering drafting, infrared spectroscopy, and scientific glassblowing. Tr. 2377-2378m, 4663-4668; DX 176, 222, 224-225.

Positions on the SD schedule include professional chemical engineers, other professional engineers, agricultural scientists, and chemists. These individuals perform scientific research, and their professional jobs require college and post-graduate degrees in the specialized fields for which they are hired. Tr. 2312-2313, 3823, 4256-4261, 4650. A small number of individuals with chemistry degrees (both black and white) who were hired as SE schedule chemical laboratory analysts have been promoted or reclassified as SD schedule analytical chemists. The number of such moves from SE to SD schedule positions is quite small compared to the size of either of those schedules. Tr. 1396-1397, 4662; PX 524; DX 78, 83.

The SF (custodial) schedule consisted of 10 employees in 1980. It was reduced from 14 in 1972; there have been only 2 or 3 hires in that group since 1972. The seven blacks on the schedule are all long-term employees; there was no testimony that any of them sought movement to noncustodial

jobs at OACD. The only black SF schedule employee who testified, William James, indicated he was not interested in work other than custodial work at TVA and that he had turned down several offers to move to other kinds of work. Tr. 925-927, 1085-1091, 3724-3726, 4473-4480, 4496-4500; DX 124.

2. The original complaint under Title VII seeking individual and class relief was filed by Frank Eastland in 1973; an amended complaint was joined by eleven other black OACD employees (*Eastland* v. *TVA*, 553 F.2d 364, 365-366 (5th Cir. 1977)). The district court granted summary judgment against ten of the named plaintiffs on the ground that they had failed to exhaust their administrative remedies; the court of appeals concluded that this was incorrect as to William James, and remanded his case for trial de novo. It also concluded that Louis Sheffield's and Eastland's claims should receive plenary review in the district court at which time other employees could seek to intervene as a class. 553 F.2d at 369-372.[3]

3. The district court rejected both the class and the individual claims after a seven week trial in 1980, at which 45 witnesses testified and 790 exhibits were received.[4] Despite extensive anecdotal evidence about OACD promotion practices, the district court concluded that petitioners had "failed to provide evidence to the court of a single example of a black who should have been promoted or reclassified upward and was not" (Pet. App. E28).[5] Petitioners also

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[3]The district court, before *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), had granted summary judgment against Sheffield on the basis of the administrative record and remanded Eastland's claims to the Civil Service Commission (553 F.2d at 371 & n.16).

[4]It also rejected Robert Nash's individual claim, which accrued after its original decision.

[5]The district court found that "the only evidence worthy of review is that on the issue of promotion" (Pet. App. E4). It summarily rejected

provided statistical evidence, including the multiple regression analyses at issue here.[6]

Petitioners did not attempt to establish a foundation for the model used in these analyses.[7] Although the independent variables in petitioners' regression analyses included one entitled "technical and non-technical degrees", they ignored the variety of specialized skills required for the higher paying jobs at OACD. Respondents countered with regression analyses that did reflect this variety; separate analyses were run for each job schedule, as well as for a combined schedule SD-SE and SA-SB.[8] These regressions showed no significant racial effects on salary.[9]

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the class claims of discrimination in transfer, training, assignment, and other conditions of employment (*id.* at E3-E4, E6). The court of appeals affirmed these holdings (Pet. App. A2-A3, D10), and petitioners do not here challenge them.

[6]Petitioners' evidence consisting of a series of comparisons of the average salaries of blacks and whites at OACD was given "little or no weight" by the district court, because it "ignored important differences in skills, education, training and experience" (Pet. App. E27). The district court also noted (Pet. App. E29) that the large number of blacks recently hired by TVA at entry level salaries tended to reduce the average black salary level. The court of appeals again agreed with the rejection of this evidence (Pet. App. D12), and petitioners do not raise that issue here.

[7]A model expresses the statistician's hypothesis about the relationships between the variables he is investigating — here, the salary levels and the administration of the personnel system at OACD.

[8]These analyses were presented not to prove absence of discrimination at OACD, but to point out that other factors, not included in petitioners' regressions, would account for the race effect. Respondents' expert witness who prepared these regressions did not believe that regressions were appropriate in this case because of the heterogeneity of jobs at OACD, and the relatively small number of employees in comparable jobs. In his opinion, because the jobs at OACD were so different in terms of skills and responsibilities, OACD would be extremely difficult to model within the limits of a multiple regression analysis.

[9]The regression for schedule SE approached a statistically significant negative racial effect (Pet. App. D14 n.12). See note 15, *infra*.

The district court also noted that for all the relevant schedules, "the percentage of blacks in the labor force at OACD was higher than the percentage of blacks in the relevant labor market" (Pet. App. E25), and blacks were neither promoted at slower rates nor relegated to lower level jobs than whites (Pet. App. E29).

4. The court of appeals affirmed the district court's rejection of petitioners' class claims.[10] It agreed with the district court's criticism of petitioners' regression analyses as giving insufficient recognition to the varied qualifications for different jobs considered (Pet. App. D12-D19). In the course of its discussion, the court of appeals quoted Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702 (1980), and D. Baldus & J. Cole, *Statistical Proof of Discrimination* (1980 & Supp. 1982), to explain the theoretical basis for the use of regression analyses in Title VII cases.

Petitioners sought rehearing, presenting affidavits from the authors of these materials (as well as two other experts) alleging that, in their view, petitioners' regression analysis did show statistically significant racial effects on salary at OACD (Pet. Apps. F1-F9, G1-G9, H1-H6). The court of appeals refused to consider "ex parte, post decision statements" (Pet. App. C1); it accordingly ordered the affidavits stricken from the rehearing petition, refused to add them to the record on petitioners' subsequent motion under Fed. R. App. P. 10(e), and denied the motion for rehearing (Pet. Apps. B1, C1).

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is accordingly not warranted.

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[10]It reversed the denial of the individual claims of Eastland and Long, and remanded those claims to the district court for further proceedings (Pet. App. D22-D25). Those claims are not before this Court.

1. Contrary to petitioners' argument, the court's citation of authorities in discussing the basic statistical principles involved in multiple regression analyses does not entitle petitioners to present to the court, after its decision, the views of those experts on the application of those principles to the instant case. Petitioners cite no authority justifying a departure from the fundamental rule that the appellate court limits its consideration to the evidence presented to the district court (Fed. R. App. P. 10(e); 9 *Moore's Federal Practice*, para. 210.08[2], at 10-61, para. 210.09, at 10-64 & n.2 (2d ed. 1983); *Manning* v. *Lockhart*, 623 F.2d 536, 538 (8th Cir. 1980)), and we are aware of none.

The court of appeals' opinion does not support petitioners' contention that its rejection of petitioners' regression analyses "rests entirely on its understanding of statistical science as gleaned from the works of Professors Fisher, Baldus and Cole" (Pet. 9). Instead, those works are cited simply as convenient summaries of the relevant principles, and both petitioners and respondents had cited these and other similar works in their briefs in the court of appeals. But even if petitioners were correct in their assessment of the extent of the court's reliance on those authorities, the affidavits do not support their further claim that the court misunderstood the principles described therein. The affidavits merely explain how the authors would apply those principles to the facts of this case. Even if these statisticians had been presented as expert witnesses at trial, where their views could have been tested by cross examination, their conclusions would not have been binding on the fact finder. 11 *Moore's Federal Practice* § 702.30, at VII-32 to VII-39 (2d ed. 1983); *Webster* v. *Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970), cert. denied, 404 U.S. 823 (1971); *United States* v. *Simon*, 425 F.2d 796 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970); *United States* v. *Coleman*, 501 F.2d 342, 346 (10th Cir. 1974); cf. Fed. R.

Evid. 704. Where, as here, a party presents statistical evidence in the form of a multiple regression analysis, it is the responsibility of the fact finder to evaluate the validity of the statistical model used in that analysis and the assumptions underlying the analysis—*e.g.*, whether all the major variables likely to have a significant effect on the dependent variable have been included—and on the basis of that evaluation to determine the significance of the results. See, *e.g.*, *Wilkins* v. *University of Houston*, 654 F.2d 388, 402-403 (5th Cir. 1981). The court of appeals was accordingly not required to reopen the record to consider the additional expert opinions on these matters on rehearing.

Petitioners incorrectly claim that they had no opportunity to "refute" the court's reliance on "extra-record expert evidence" (Pet. 13). The principles described in the materials cited by the court of appeals were not in issue, and petitioners at trial had ample opportunity to defend the application of those principles in their multiple regression analyses.[11] Moreover, they were given the opportunity at trial to present additional expert testimony (Tr. 2330), but chose not to do so.

Finally, even if we assume arguendo that the affidavits establish that the court of appeals misinterpreted the technical materials, they do not show that this misinterpretation was "dispositive" (Pet. 14). This Court has suggested that standard deviations of more than two or three represent a minimum cognizable level of statistical significance. *Hazelwood School District* v. *United States*, 433 U.S. 299, 311-312 n.17 (1977); *Castaneda* v. *Partida*, 430 U.S. 482, 496-497 n.17 (1977). Petitioners' proffered affidavits reanalyze

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[11] Indeed, the affidavits essentially reiterate the petitioners' arguments concerning the validity of their multiple regression analyses that were presented to the district court and the court of appeals and rejected by them. Compare D13-D17 with F4-F6.

the regressions submitted at trial and conclude that the job levels of blacks differ from those that would result in the absence of discrimination by a standard deviation of between two and three (Pet. App. F8, G6-G8), rather than, as the court below found, less than two (Pet. App. D14). Because the lower court's rejection of all the other evidence on which petitioners relied to establish discrimination is not challenged here,[12] there is no reason to believe that this minor difference in the results of the statistical analysis would have changed the result reached. Indeed, the court of appeals assumed that there was a borderline showing of a statistically significant race effect for the SE schedule, and still held that petitioners had not produced adequate proof to show discrimination on that schedule. See note 15, *infra*.

2. Petitioners also contend (Pet. 14-16) that this Court should address the question of when statistical evidence presented in Title VII cases must account for differences in job qualifications, and that this issue is related to the government's petition for a writ of certiorari in *Trout* v. *Lehman*, No. 83-706. Neither contention has merit.

In *Trout* v. *Lehman*, the court of appeals rejected the legal analysis underlying the district court's reliance on the plaintiffs', rather than the defendants', statistical analyses, but nevertheless affirmed the decision that resulted from that misplaced reliance. Our petition seeks redress of that fundamental error. There is no similar problem here, where the court of appeals approved both the district court's analysis and the result it reached. Accordingly, this Court's action on our petition in *Trout* will have no bearing on the propriety of the decision below, and the facts of this case cast no light on the issues presented there.

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[12]Petitioners' bald assertion (Pet. 4) that they "proved discrimination four ways" is simply incorrect.

Nor is there any conflict in the courts of appeals on the need for consideration of differences in job qualifications in Title VII cases. Instead, the cases simply reflect the fact that different factual situations require different statistical analyses. Thus, in *James* v. *Stockham Valves & Fitting Co.*, 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978), upon which petitioners rely (Pet. 16-18), the jobs compared involved industrial operations requiring little training or education to achieve proficiency (559 F.2d at 314, 327-329, 343-344).[13] In contrast, here, as in *Valentino* v. *United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982), the jobs involved had highly disparate qualifications so that it was not appropriate to treat them as comparable for statistical purposes.[14]

Comparing the treatment of employees within the same job schedules did not, as petitioners claim (Pet. 18), lead to any "masking" of discriminatory treatment. First, there was no indication that any employees, black or white, had moved from custodial or clerical job schedules to technical or scientific ones, or that their failure to do so in any way reflected prohibited employment practices. There was some movement from the SE (technical) schedule to the SD (scientific) one, but to the extent that that movement suggests the two schedules involved roughly comparable jobs, respondents' regression analysis combining schedules SE

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[13] *James* also involved a claim that the training, which was given at the plant, was not available to blacks. 559 F.2d at 340-345.

[14] Petitioners correctly note (Pet. 16 n.14) that the district court in *Trout* distinguished *Valentino* from the fact situation before it on that gound (517 F. Supp. 873, 883 (D.D.C. 1981)). Petitioners fail to mention, however, that all the disparate occupations (except lawyers) identified in the *Trout* description of *Valentino* are also present, with others, in the OACD occupations treated as comparable in the petitioners' regressions.

and SD refuted any suggestion of a significant racial effect.[15] In any event, there was no testimony by any blacks that they had been placed on an inappropriate schedule.[16] Petitioners simply hypothesize such a situation.[17] There is, accordingly, no factual basis for their objection.

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[15]Although the court of appeals assumed (Pet. App. D14 n.12) that there was a "borderline" statistical showing of racial difference in the SE schedule regression analysis, respondents' expert testified at trial that this was not significant, because although prior outside experience—a variable not on the computer file—was important to develop the skills needed for several jobs at higher levels on that schedule, petitioners' timing in presenting their regressions had prevented coding of these data onto the file and respondents' answering regression analysis was accordingly not corrected to eliminate this effect. (Tr. 2802-2810). See also note 6, *supra* (average black salary level reduced by large number of recent hires in entry level positions).

[16]No black aide testified he should have been a professional chemist. The proof showed that two blacks with chemistry degrees (as compared to 10 whites with chemistry degrees) had been hired as aides since 1970. One of these blacks had a visual impairment precluding professional-level work; the other was hired in 1980 during a period when OACD hired no professional chemists. A white with a chemistry degree was hired as an aide during the same period. Tr. 4109; DX 176.

[17]They do suggest that their hypothetical "parallels the career" of petitioner Sheffield (Pet. 18 n.16). Sheffield was promoted to an SD schedule position as a professional chemist in 1963, substantially before the period at issue in this case (Tr. 1291).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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